

2009

# Chad Hudgens v. Prosper INC., and Joshua Christopherson: Brief of Appellant

Utah Court of Appeals

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**IN THE UTAH SUPREME COURT**

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**CHAD HUDGENS**, an individual, )

Appellant and Plaintiff, )

vs. )

**PROSPER, INC.**, a Utah corporation )  
and **JOSHUA CHRISTOPHERSON**, )  
an individual, )

Case No. 20090391-SC  
080400249

Appellees and )  
Defendants. )

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**APPELLANT'S BRIEF**

---

**Appeal From The Judgment of The Fourth Judicial District Court  
of Utah County, Honorable Gary D. Stott**

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**Andy V. Wright (# 11071)**  
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## **PARTIES TO APPEAL**

**Appellant:** Chad Hudgens (“Hudgens”).

**Appellees:** Prosper, Inc. and Joshua Christopherson (collectively “Prosper” or “defendants”).

## **STATEMENT OF JURISDICTION**

This Court has jurisdiction over this appeal pursuant to U.C.A. § 78A-3-102(3)(k) and Article 8, § I of the Utah Constitution. This is an appeal from a final judgment of the Fourth Judicial District Court of Utah County, State of Utah, entered on March 27, 2009.

## **STATEMENT OF ISSUES AND STANDARD OF APPELLATE REVIEW**

- I. THE TRIAL COURT ERRED BY DISMISSING HUDGENS’ CLAIMS FOR ASSAULT AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS ON THE GROUNDS THAT THEY WERE PRECLUDED BY THE EXCLUSIVITY PROVISION OF THE UTAH WORKER’S COMPENSATION ACT, U.C.A. § 34A-2-105.**

**Standard of Review:** The Trial Court’s decision to dismiss a cause of action under U. R. Civ. P. 12(b)(6) is reviewed for correctness. Wintergreen Group v. Utah Dept. Of Transp., 171 P.3d 418, 420 - 21 (Utah 2007).

**Preservation of Issue For Review:** Hudgens’ Opposition to Prosper’s Motion to Dismiss, R. 69-44; Hudgens’ Motion and Memorandum for Leave to File an Amended Complaint and Reply Memorandum, R. 107-93, 177-70; Notice of Appeal, R. 193-92.



**Grounds For Review of Any Issues Not Preserved:** The Trial Court committed plain error in dismissing Hudgens' claims of assault and intentional infliction of emotional distress. The error should have been obvious to the Trial Court and the error is harmful to Hudgens. Therefore, appellate court review of this case is appropriate. State Ex Rel T.M., 73 P.3d 959, 963 (Utah App. 2003).

**II. THE TRIAL COURT ERRED IN GRANTING PROSPER'S MOTION TO DISMISS HUDGENS' WRONGFUL TERMINATION CLAIM ON THE GROUNDS THAT HUDGENS HAD FAILED TO SATISFY THE PUBLIC POLICY EXCEPTION.**

**Standard of Review:** The Trial Court's decision to dismiss a cause of action under U. R. Civ. P. 12(b)(6) is reviewed for correctness. Wintergreen Group, 171 P.3d at 420 - 21.

**Preservation of Issue For Review:** Hudgens' Opposition to Prosper's Motion to Dismiss, R. 69-44; Hudgens' Motion and Memorandum for Leave to File an Amended Complaint and Reply Memorandum, R. 107-93, 177-70; Notice of Appeal, R. 193-92.

**Grounds For Review of Any Issues Not Preserved:** The Trial Court committed plain error in dismissing Hudgens' wrongful termination claim. The error should have been obvious to the Trial Court and the error is harmful to Hudgens. Therefore, appellate court review of this case is appropriate. State Ex Rel T.M., 73 P.3d at 963 (Utah App. 2003).

### **III. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING HUDGENS' MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT.**

**Standard of Review:** Denial of the Motion for Leave to Amend is reviewed for an abuse of discretion. Turville v. J&J Properties, LC, 145 P.3d 1146, 1150 (Utah App. 2006).

**Preservation of Issue For Review:** Hudgens' Motion and Memorandum for Leave to File an Amended Complaint and Reply Memorandum, R. 107-93, 177-70; Notice of Appeal, R. 193-92

**Grounds For Review of Any Issues Not Preserved:** The Trial Court committed plain error in denying Hudgens leave to amend his Complaint. The error should have been obvious to the Trial Court and the error is harmful to Hudgens. Therefore, appellate court review of this case is appropriate. State Ex Rel T.M., 73 P.3d at 963 (Utah App. 2003).

### **STATEMENT OF THE CASE**

#### **Nature of The Case**

This case arises from an episode where appellant Chad Hudgens was assaulted by his supervisor at work as part of a training exercise. Specifically, Prosper executive Joshua Christopherson, with specific intent to inflict an injury upon Hudgens, waterboarded Hudgens by pouring a gallon jug of water into Hudgens' nose and mouth while Hudgens' co-workers held him down. Hudgens was unable to continue working at Prosper and left shortly after the incident.

### **Course of Proceedings**

Hudgens filed suit against defendants on January 17, 2008. See Verified Complaint, Addendum, Ex. A, R. 11-3. Defendants filed a Motion to Dismiss, arguing that Hudgens' claims were precluded by the Utah Worker's Compensation Act, U.C.A. § 34A-2-105 and also that Hudgens had failed to state a claim for wrongful termination. On July 23, 2008, the Trial Court granted Prosper's Motion to Dismiss without prejudice. See July 23, 2008 Ruling, Addendum, Ex. B, R. 92-85. On October 3, 2008, Hudgens filed a Motion for Leave to File an Amended Complaint and attached a Proposed Amended Verified Complaint. See Proposed Amended Complaint, Addendum, Ex. C, R. 102-93. Defendants opposed that motion and moved to have Hudgens' Complaint dismissed with prejudice. On February 10, 2009, after oral argument, the Trial Court denied Hudgens' Motion for Leave to File an Amended Complaint and granted defendants' Motion to Dismiss Hudgens' Complaint with prejudice.

### **Disposition in The Lower Court**

The Court entered a final judgment in favor of Prosper on March 27, 2009. This is an appeal from that entire decision.

## **STATEMENT OF FACTS**

1. Plaintiff Chad Hudgens is a resident of Utah County, Utah. Verified Complaint at ¶ 1, Addendum, Ex. A, R. 11.

2. Defendant Prosper, Inc. is a resident of Utah County, Utah. Verified Complaint at ¶ 2, Addendum, Ex. A, R. 11.

3. Defendant Joshua Christopherson is a resident of Utah County, Utah. Verified Complaint at ¶ 3, Addendum, Ex. A, R. 11.

4. Prosper provides self-help and motivational coaching to individual clients. During all relevant times, Hudgens was an employee of Prosper. Verified Complaint at ¶ 6, Addendum, Ex. A, R. 10.

5. Hudgens was 26 years old and had been working at Prosper for 10 months at the time of the episodes alleged herein. Verified Complaint at ¶ 7, Addendum, Ex. A, R. 10.

6. During all relevant times Christopherson was an employee of Prosper. Upon information and belief, Christopherson was one of Prosper's top income producers. Verified Complaint at ¶ 8, Addendum, Ex. A, R. 10.

7. During all relevant times, Hudgens was a member of Christopherson's team. Verified Complaint at ¶ 9, Addendum, Ex. A, R. 10.

8. On or about May 29, 2007, Christopherson asked for volunteers for a new motivational exercise. In his search for volunteers, Christopherson specifically challenged

the loyalty and determination of his team members. Christopherson did not disclose what the exercise was. In an effort to prove his loyalty and determination to Christopherson and Prosper, and thereby be considered a favored member of the team, Hudgens volunteered. Verified Complaint at ¶ 12, Addendum, Ex. A, R. 9.

9. Christopherson marched his entire team to the top of a hill outside the office. He ordered Hudgens to lie down with his head facing downhill. He instructed the other team members to hold Hudgens by the arms and legs. Verified Complaint at ¶ 13, Addendum, Ex. A, R. 9.

10. Christopherson then slowly poured a gallon jug of water over Hudgens' mouth and nostrils, thereby making it impossible for Hudgens to breathe for a sustained period of time. Verified Complaint at ¶ 14, Addendum, Ex. A, R. 9.

11. Christopherson's exercise is more commonly known as "waterboarding," a controversial coercive interrogation technique which some people and governments consider torture. It is designed to, among other things, cause injury by creating panic and confusion in the subject by creating the impression in the subject that he is drowning. Verified Complaint at ¶ 15, Addendum, Ex. A, R. 9.

12. Christopherson directed Hudgens' team members to hold him down even though Hudgens was struggling and resisting and was attempting to escape. Christopherson

did not stop pouring water into Hudgens' mouth and nostrils even though he saw that Hudgens was struggling to breathe. Verified Complaint at ¶ 16, Addendum, Ex. A, R. 9.

13. Christopherson had a conscious and deliberate intent to injure Hudgens by use of waterboarding. This is so because Christopherson believed that the only way in which the motivational exercise could succeed was to cause Hudgens to experience the panic and suffocation integral to the purpose and functioning of waterboarding. This is why Christopherson directed a team member to hold Hudgens' head in place so that it would not move as he poured water in Hudgens' nose and mouth. This is why Christopherson did not stop pouring water into Hudgens' nose and mouth until the jug was empty even though he saw Hudgens struggling to breathe. In other words, by consciously and deliberately waterboarding Hudgens, Christopherson exhibited a conscious and deliberate intent to cause an injury to Hudgens. Proposed Verified Amended Complaint at ¶ 17, Addendum, Ex. C, R. 99.

14. Following Christopherson's intentional assault, Hudgens approached someone in Prosper's human resources department and explained what had just happened to him. Despite disclosing this information, Prosper took no action, including action against Christopherson, until after Hudgens left Prosper. Verified Complaint at ¶ 18, Addendum, Ex. A, R. 8.

15. Following Christopherson's assault, Hudgens began to experience symptoms of sleeplessness, anxiety and depression. He began to feel sick to his stomach at work and was no longer able to work at Prosper. Verified Complaint at ¶ 19, Addendum, Ex. A, R. 8.

16. Because of the trauma caused by Prosper's sales exercises, Hudgens has required psychological counseling and has suffered physical and emotional harm. Verified Complaint at ¶ 20, Addendum, Ex. A, R.8.

### **SUMMARY OF ARGUMENT**

#### **I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN DISMISSING HUDGENS' CLAIMS FOR ASSAULT AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS ON THE GROUNDS THAT THEY WERE PRECLUDED BY THE EXCLUSIVITY PROVISION OF THE UTAH WORKER'S COMPENSATION ACT, U.C.A. § 34A-2-105.**

Hudgens stated a claim for assault and intentional infliction of emotional distress in both his Complaint and proposed Amended Complaint that easily avoided the exclusivity provision of the Worker's Compensation Act. Specifically, Hudgens pled that Prosper acted with a conscious and deliberate intent to injure Hudgens by use of waterboarding techniques as part of a training exercise because it knew or expected that the use of those techniques would cause an injury to Hudgens. The allegations of both the Complaint and proposed Amended Complaint clearly and expressly identify the elements necessary to state cognizable claims under Utah law. The Trial Court did not apply the standards for dismissing a complaint correctly and erred in dismissing Hudgens' Complaint.

**II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN DISMISSING HUDGENS' CLAIM FOR WRONGFUL TERMINATION ON THE GROUNDS THAT HUDGENS HAD FAILED TO PLEAD A PUBLIC POLICY EXCEPTION TO THE AT-WILL DOCTRINE.**

Hudgens identified a public policy interest that constituted an exception to the at-will doctrine. Specifically, there is a public policy interest in the emotional and physical safety and integrity of Utah citizens, particularly in the work place. This policy can be gleaned from numerous civil and criminal statutory prohibitions against assault and battery as well as laws and regulations requiring employers to maintain a safe workplace.

These laws and regulations evidence an intent by the Utah Legislature and the Utah Court system to establish a legal context and framework in which the physical and emotional integrity of its citizens are protected from unwarranted, intentionally abusive intrusion, such as in this case. A termination resulting from a violation of this policy is an exception to the at-will doctrine as articulated by Utah law. Therefore, the Trial Court erred in dismissing this claim.

**III. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING HUDGENS' MOTION FOR LEAVE TO AMEND HIS COMPLAINT.**

Utah law has long recognized that leave to amend should be freely given when justice so requires. Timm v. Dewsnap, 851 P.2d 1178, 1183 (Utah 1993); U. R. Civ. P. 15(a). In this case, Hudgens prepared a proposed Amended Complaint which directly addressed the deficiencies in his original Complaint identified by the Trial Court its July 23 Ruling,



particularly with respect to Hudgens' wrongful termination claim. Without allowing any discovery or the development of any factual record, and without providing any written explanation for its reasoning, the Trial Court denied Hudgens leave to amend. The Trial Court abused its discretion in not allowing Hudgens to amend his Complaint to develop facts that supported his claims and that would entitle him to relief.

### **ARGUMENT**

#### **I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN DISMISSING HUDGENS' CLAIMS FOR ASSAULT AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS ON THE GROUNDS THAT THEY WERE PRECLUDED BY THE EXCLUSIVITY PROVISION OF THE UTAH WORKER'S COMPENSATION ACT, U.C.A. § 34A-2-105.**

At the outset, it is important to remember the procedural posture of this case at the Trial Court level. Before answering, Prosper filed a Motion to Dismiss the Complaint. The Trial Court granted that motion without prejudice and allowed Hudgens the opportunity to file a Motion for Leave to Amend his Complaint. The Trial Court subsequently denied Hudgens' Motion for Leave to Amend and granted Prosper's Motion to Amend the Court's original dismissal order to dismiss Hudgens' Complaint with prejudice. Keeping this procedural background in mind will assist this Court in analyzing the issues raised by Hudgens' appeal. Specifically, the Trial Court failed to apply the long known standard for granting motions to dismiss and, similarly, failed to see that Hudgens had adequately pled

claims for intentional torts in both his original Complaint and in his proposed Amended Complaint.

**A. The Trial Court Misapplied The Controlling Standards For Reviewing Motions to Dismiss.**

It is well-settled that dismissal under U. R. Civ. P. 12(b)(6) is improper unless Hudgens can prove no set of facts which would entitle him to relief. Russell/Packard Development, Inc. v. Carson, 78 P.3d 616, 620 (Utah App. 2003). Of course, in ruling on a Motion to Dismiss for failure to state a claim, the Trial Court was required to construe the Complaint in a light most favorable to Hudgens and indulge all reasonable inferences in his favor. Helf v. Chevron U.S.A., Inc., 203 P.3d 962, 965 (Utah 2009). In addition, it is well-settled that “[d]ismissal of a claim under Rule 12(b)(6) is a severe measure given the liberality of notice pleading and must be granted only when it is apparent that under no set of facts proven in support of the claims as pleaded would a party be entitled to relief.” Olson v. Park-Craig-Olson, Inc., 815 P.2d 1356, 1360 (Utah App. 1991) (citing Colman v. Utah State Land Board, 795 P.2d 622, 624 (Utah 1990)) (emphasis added).

These generally applicable standards are not suspended simply because this case involves a challenge to the exclusivity provision of the Utah Worker’s Compensation Act, U.C.A. § 34A-2-105. The cases relied upon by Prosper in the Trial Court, particularly Lantz v. Nat’l. Semiconductor Corp., 775 P.2d 937 (Utah App. 1989), do not articulate a standard for reading a complaint that is any different than the standard articulated by Hudgens here

nor does the fact that the case involves the applicability of the Worker's Compensation Act change in any way the level of scrutiny the Trial Court should have applied to the allegations in both Hudgens' Complaint and Proposed Amended Complaint.

Moreover, in a case decided by this Court days after the Trial Court denied Hudgens' Motion for Leave to Amend and dismissed his Complaint with prejudice, this Court reversed a dismissal of a claim that shared many pleading similarities with the instant matter. In Helf v. Chevron U.S.A., Inc., 203 P.3d 962 (Utah 2009), the Court ruled that a complaint that alleged that defendants knew or expected that their conduct would cause an injury satisfied the "intent to injure" standard set forth under Utah law in cases such as Lantz, supra.

In Helf, the Court conducted a painstaking review of Utah case law concerning whether an employee has stated a claim for workplace injury that is not barred by the Utah Worker's Compensation Act. The Court articulated the controlling standard:

**We therefore hold that the 'intent to injure' standard requires a specific mental state in which the actor knew or expected that injury would be the consequence of his actions. To demonstrate intent, a plaintiff may show that the actor desired the consequences of his actions or that the actor believed the consequences were virtually certain to result. . . . In other words, the employer must know or expect that a specific employee will be injured doing a specific task.**

Helf, 203 P.3d at 974 (emphasis added). Applying these standards, it is clear that Hudgens adequately pled claims for intentional injury in both his original and proposed Amended Complaint.

**B. Hudgens Has Pled Sufficient Facts to Overcome The Exclusivity Provision of the Utah Worker's Compensation Act.**

In the July 23 Ruling, the Trial Court determined:

The allegations contained in the Complaint are not sufficient to support a claim that the defendant had a conscious and deliberate intent to injure plaintiff . . . . The Complaint contains no facts showing that Christopherson took his actions based on a conscious and deliberate intent to injure plaintiff.

July 23 Ruling, Addendum, Ex. B., R. 89. This was error.

In his original Complaint, Hudgens alleged as follows:

12. On or about May 29, 2007, Christopherson asked for volunteers for a new motivational exercise. In his search for volunteers, Christopherson specifically challenged the loyalty and determination of his team members. Christopherson did not disclose what the exercise was. In an effort to prove his loyalty and determination to Christopherson and Prosper, Hudgens volunteered.
13. Christopherson marched his entire team to the top of hill outside the office. He ordered Hudgens to lie down with his head facing downhill. He instructed the other team members to hold Hudgens by the arms and legs.
14. Christopherson then slowly poured a gallon jug of water over Hudgens' mouth and nostrils, thereby making it impossible for Hudgens [to] breath[e] for a sustained period of time.

15. Christopherson's exercise is more commonly known as "water boarding" a controversial coercive interrogation technique which some people and governments consider torture. It is designed to, among other things, create panic and confusion in the subject by creating the impression in the subject that he is drowning.
16. Christopherson directed Hudgens' team members to hold him down even though Hudgens was struggling and resisting and was attempting to escape.
17. At the conclusion of his abusive demonstration, Christopherson told the team that he wanted them to work as hard on making sales as Chad had worked to breathe while he was being waterboarded.

Verified Complaint, Addendum, Ex. A, R. 11-8.

Of particular importance is paragraph 17, where Christopherson acknowledges his awareness that Hudgens was experiencing the intended and injurious effects of the waterboarding exercise, i.e., panic and suffocation, because he wanted to tell his team to work as hard on sales as Hudgens had worked on breathing. Verified Complaint, Addendum, Ex. A, R. 8. This conclusion is amply supported by paragraph 16 of the Complaint where Hudgens alleges that Christopherson directed his team to restrain Hudgens even though **"he was struggling and resisting and attempting to escape"** (emphasis added). Verified Complaint, Addendum, Ex. A, R. 9. In other words, Christopherson knew or expected that Hudgens would suffer a specific injury – panic and suffocation. Accordingly, the intent to injure standard as articulated by this Court has been satisfied. Helf, 203 P.3d at 974. Nor

is it significant, as Prosper argued below, R. 159, that Prosper was motivated by a desire to inspire the sales team to improve performance. The Court in Helf recognized the important difference between motive and intent.

**[T]he legal definition of intent encompasses more than simply motive. . . . The distinction between intent and motive is particularly important in applying the ‘intent to injure’ standard because an intentional injury may arise in instances where the employer intentionally placed an employee in harm’s way, but the employer’s motive was to increase profits – not to inflict injury.**

Helf, 203 P.3d at 972 (emphasis added). Thus, the Court concluded, the “intent to injure” standard may be satisfied regardless of the specific motive of the employer. Id. at 973.

Additionally, as stated, the specific conduct alleged in Hudgens’ Complaint must be taken as true for the purposes of a Motion to Dismiss and Hudgens was entitled to all reasonable inferences arising from those allegations. Helf, 203 P.3d at 965. Clearly, then, Hudgens adequately pled that defendants’ conduct was a deliberate and conscious intent to inflict an injury upon him. It appears that the Trial Court did not grant Hudgens the inferences from these allegations that defendants knew or expected that their conduct would injure him. This was error.

However, even if the Trial Court were correct in its July 23 Ruling, Hudgens cured any deficiencies in his proposed Amended Complaint. Specifically, Hudgens alleged:

**Christopherson had a conscious and deliberate intent to injure Hudgens by use of waterboarding. This is so because**

**Christopherson believed that the only way in which the motivational exercise could succeed was to cause Hudgens to experience the panic and suffocation integral to the purpose and functioning of waterboarding. This is why Christopherson directed a team member to hold Hudgens' head in place so that it would not move as he poured water in Hudgens' nose and mouth. This is why Christopherson did not stop pouring water into Hudgens' nose and mouth until the jug was empty even though he saw Hudgens struggling to breathe. In other words, by consciously and deliberately waterboarding Hudgens, Christopherson exhibited a conscious and deliberate intent to cause an injury to Hudgens.**

Proposed Verified Amended Complaint at ¶ 17, Addendum, Ex. C, R. 99 (emphasis added).

This allegation in the proposed Amended Complaint clearly satisfies the pleading requirements the Trial Court claimed were missing from Hudgens' original Complaint. Hudgens satisfied all applicable pleading requirements under Rule 12(b)(6) and Helf, if not in his original Complaint then certainly in his proposed Amended Complaint. Accordingly, the Trial Court committed clear error and its ruling dismissing Hudgens' claims for assault and intentional infliction of emotional distress should be reversed. Additionally, as explained herein, the Trial Court's refusal to allow Hudgens to amend his Complaint was an abuse of discretion.

**II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN DISMISSING HUDGENS' CLAIM OF WRONGFUL TERMINATION ON THE GROUNDS THAT HUDGENS HAD FAILED TO ADEQUATELY PLEAD A PUBLIC POLICY EXCEPTION TO THE AT-WILL DOCTRINE.**

In its July 23 Ruling, the Trial Court determined that Hudgens “failed to make out a prima facie case for wrongful termination in violation of public policy.” July 23 Ruling, Addendum, Ex. B, R. 87. The Trial Court also determined that the connection between the policies referred to by Hudgens and “the conduct in question here is far too tenuous” to satisfy the requirements articulated by the Utah Supreme Court for satisfying the public policy exception to the at-will doctrine. Addendum, Ex. B, R. 87. This ruling was in error.

As a preliminary matter, Hudgens agrees that in order for him to make out a prima facie case of wrongful termination, he must show (1) that defendants terminated him; (2) that a clear and substantial public policy existed; (3) that this termination of Hudgens under the circumstances jeopardizes that public policy; (4) that the discharge and the conduct bringing the policy into play are causally connected. Ryan v. Dan's Food Stores, Inc., 972 P.2d 395, 404 (Utah 1998).

Hudgens adequately alleged that he was constructively terminated as a result of the waterboarding incident and defendants' failure to take any action when notified of it. More importantly, Hudgens' constructive termination violated a clear and substantial public policy interest under Utah law. Specifically, the termination, and particularly the circumstances giving rise to it, violated the public policy underlying the numerous statutory and common



law protections and penalties regarding the physical and emotional integrity of Utah citizens, especially in the employment context.

For example, the civil and criminal prohibitions against assault and battery are quite clear. See, e.g., MUJI 10.18 (1993) (and cases cited); U.C.A. §§ 76-5-102 (assault); 102.3 (assault against school employees); 102.4 (assault against a peace officer); 102.7 (assault against health care provider) and 107.5 (“hazing”). Indeed, Section 107.5 is particularly apt since “hazing” is defined as an intentional, knowing or reckless act that

endangers the mental or physical health or safety of another; or . . . involves brutality of a physical nature . . . or involves consumption of any . . . substance or other physical activity that endangers the mental or physical health and safety of an individual; or involves any activity that would subject the individual to extreme mental stress . . . and is for the purpose of initiation, admission into, affiliation with, holding office in, or as a condition for continued membership in any organization.

Section 107.5 refers to intentional physical abuse as an element of admission to a group **or continued membership** therein. This point is important because, in both his Complaint and proposed Amended Complaint at paragraph 12, Hudgens alleges “in his search for volunteers Christopherson specifically challenged the loyalty and determination of his team members.” R. 9 and R. 100. Thus, the physical abuse Christopherson intentionally inflicted upon Hudgens was part of Christopherson’s challenge to the member of his team to remain favored within the group.

In addition, there are numerous regulations dealing with workplace safety. See, e.g., U.C.A. § 34-6-201, the Utah Occupational Safety and Health Act, which states: “Each employer shall furnish each of the employer’s employees employment and a place of employment free from recognized hazards that are causing or are likely to cause death or physical harm to the employer’s employees and comply with the standards promulgated under this chapter.” See also Declaration of Governor Jon M. Huntsman for National Safety Month, June, 2007. Addendum, Ex. D, R. 168.

By extension, there are also provisions which protect the physical privacy of Utah workers. See, e.g., U.C.A. § 34-38-1 et seq., the Utah Employee Drug Testing Act. These laws and regulations evidence an intent by the Utah Legislature and the Utah Court System to establish a legal context and framework in which the physical and emotional integrity of its citizens are protected from unwarranted, intentional or abusive intrusions – precisely the situation presented by this case.

Hudgens readily acknowledges that there is no express policy forbidding employer’s from water boarding their employees. It did not seem necessary to have such a policy until now. However, when trying to determine whether the public policy exception is applicable, this Court has held:

**The analysis of whether the public policy exception applies to a particular legal right or privilege will frequently require a balancing of competing legitimate interests: The interests of the employer to regulate the workplace environment to**

**promote productivity, security, and similar lawful business objectives and the interests of the employees to maximize access to their statutory and constitutional rights within the workplace . . . . ‘Public policy’ is a label we attach to those shared expectations and standards of conduct which have acquired both widespread and deeply held allegiance among the citizens generally.**

Hansen v. American Online, Inc., 96 P.3d 950, 953 (Utah 2004) (emphasis added).

In this case, defendants have **no interest** in using coercive interrogation techniques such as water boarding as motivational exercises for their employees. Indeed, such conduct is wholly unrelated to any lawful business objective. Of significance, as well, is this Court’s acknowledgment that an **employer** interest is in the security of the workplace. Hansen, 96 P.3d at 953. Defendants have completely abrogated their obligations to that interest by and through the conduct alleged in Hudgens’ Complaint.

For his part, Hudgens has an undeniable and deep-seated interest and expectation that whatever burdens and difficulties his job may entail, he is entitled to treatment from his employer that protects his physical and emotional well-being and does not violate Utah’s civil and criminal laws alike. Moreover, this interest and expectation is not limited to Hudgens but has undoubtedly gained widespread and deeply held allegiance among Hudgens’ fellow citizens. As such, the expectation of physical and emotional safety in the workplace is indeed an important public policy. Hudgens’ termination violated that policy and the at-will doctrine does not apply.

Moreover, the unique facts of this case are very much akin to a specific category identified by this Court that involves a “clear and substantial public policy,” to wit, discharging an employee for refusing to commit an unlawful act. Touchard v. La-Z-Boy, Inc., 148 P.3d 945, 948 (Utah 2006). Here, Hudgens was constructively discharged for refusing to work in an environment in which his employer behaved in an unlawful manner towards him. Specifically, Hudgens refused to subject himself to the possibility that he would once again be restrained by his co-workers while a supervisor poured a gallon jug of water into his nose and mouth. Nor would he continue to work in an environment in which other forms of assault and intentional infliction of emotional harm were carried out. See Verified Complaint at ¶ 10, Addendum, Ex. A, R. 10. Hudgens stated a claim for wrongful termination of Utah law. Moreover, to the extent he did not in his original Complaint, he explicitly pled them in his Proposed Verified Amended Complaint. See Addendum at ¶¶ 30-32, Ex. C, R. 97 - 96.

As stated previously, Utah law has long recognized that dismissal is a harsh remedy. Hudgens’ case should be allowed to proceed through the discovery process so that a full record may be developed. In this way, the Court may have all the relevant factual considerations to determine whether Hudgens’ claim of a public policy interest can be sustained.

### III. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING HUDGENS LEAVE TO AMEND HIS COMPLAINT.

The Trial Court did not issue a written ruling stating why it denied Hudgens' Motion for Leave to Amend. This, in itself, constitutes a per se abuse of discretion under Utah law. Kelly v. Hard Money Funding, Inc., 87 P.3d 734, 746 (Utah App. 2004). It appears, however, that the Court did not believe Hudgens had articulated a legally cognizable public policy that would act as an exception to the at-will employment doctrine under Utah law nor did the Court believe that Hudgens had adequately stated a claim for intentional torts that was not barred by the exclusivity provision of the Utah Worker's Compensation Act. However, these decisions were an abuse of the Court's discretion.

A Trial Court abuses its discretion when it exceeds the range of discretion allowed for the particular act under review. Rivera v. State Farm Mutual Auto Ins. Co., 1 P.3d 539, 542 n. 2 (Utah 2000). While it is undeniable that the Trial Court has discretion to grant or deny a motion for leave to amend, that discretion is not boundless. **"The court's ultimate goal is to have the 'real controversy between the parties presented, their rights determined and the case decided.'"** Savage v. Utah Youth Village, 104 P.3d 1242, 1245 (Utah 2004) (citations omitted) (emphasis added).

As has been discussed elsewhere in this brief, Hudgens' proposed Amended Complaint directly addressed the concerns raised by the Trial Court in its July 23 ruling.

Thus, paragraph 17 of the Amended Complaint specifically alleges that defendant had a conscious and deliberate intent to inflict an injury upon Hudgens:

17. Christopherson had a conscious and deliberate intent to injure Hudgens by use of water boarding. This is so because Christopherson believed that the only way in which the motivational exercise could succeed was to cause Hudgens to experience the panic and suffocation integral to the purpose and functioning of waterboarding. This is why Christopherson directed a team member to hold Hudgens' head in place so that it would not move as he poured water in Hudgens' nose and mouth. This is why Christopherson did not stop pouring the water into Hudgens' nose and mouth until the jug was empty even though he saw Hudgens struggling to breathe. In other words, by consciously and deliberately waterboarding Hudgens, Christopherson exhibited a conscious and deliberate intent to cause an injury to Hudgens.

Proposed Amended Verified Complaint at ¶ 17, Addendum, Ex. C, R. 99.

Similarly, Hudgens alleged a clear public policy exception to the at-will doctrine in his Proposed Verified Amended Complaint. Specifically, paragraphs 30 - 32 of Hudgens' Proposed Verified Amended Complaint alleged:

30. The constructive termination of Hudgens violated a public policy in Utah regarding the physical and emotional integrity of Utah citizens, particularly in the workplace. This policy is found directly in numerous Utah case authorities, statutes and governmental pronouncements.
31. Allowing Prosper and Christopherson to avoid any consequences of their assault on the physical and emotional integrity of Hudgens jeopardizes the public

policy articulated above. In fact, it would sanction an egregious violation of that policy.

32. The public policy of protecting the Utah citizens from emotional and physical assault in the workplace is directly connected to Hudgens' termination. This is so because the waterboarding episode, which was a direct violation of the public policy in that it violated the physical and emotional integrity of Hudgens, caused Hudgens to leave Prosper.

Proposed Amended Verified Complaint at ¶¶ 30 - 32, Addendum, Ex. C., R. 97-96.

These allegations state viable claims under Utah law. They deserve a chance to be examined, explored and developed. Nearly every case relied upon by defendants to defeat Hudgens' intentional tort claims was decided on summary judgment or at trial. There is very little precedent for deciding a case such as this on a motion to dismiss. Clearly, both the trial courts and the appellate courts in Utah benefit from a full factual record in cases such as these. The Trial Court's decision to deny leave to amend truncated a very important process.

In failing to account for Hudgens express allegation of conscious and deliberate intent to cause injury, as set forth in paragraph 17 of his Proposed Verified Amended Complaint, Addendum, Ex. B, R. 99, and in failing to address the allegations concerning the public policy exception to the at-will doctrine, ¶¶ 30 - 32, Id., R. 97-96, the Trial Court exceeded its discretion to grant or deny a motion for leave to amend. Accordingly, the Trial Court's ruling should be reversed.

### CONCLUSION

Accepting Hudgens' allegations as true, as the Trial Court must on a Motion to Dismiss under Rule 12(b)(6), defendants did something very wrong on that hillside that day in May, 2007. The Trial Court, respectfully, misapplied the standards for stating a claim under the substantive law and under Rule 12(b)(6). Moreover, its refusal to grant Hudgens leave to amend means that defendants' wrongdoing will go unpunished. This is not a result Utah law compels or should tolerate. The Trial Court's decisions dismissing Hudgens' Complaint with prejudice and denying Hudgens' Motion for Leave to Amend should be reversed.

RESPECTFULLY SUBMITTED this 2nd day of October, 2009.

By   
Sean N. Egan  
Attorney for Appellant/Plaintiff

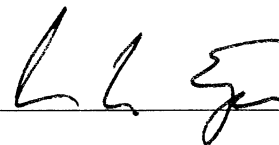


**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 2nd day of October, 2009, a true and correct copy of the foregoing **APPELLANT'S BRIEF** was served upon the persons named below, at the address set out below their name, either by mailing postage prepaid, hand-delivery, Federal Express, or by telecopying to them, a true and correct copy of said document.

**Evan A. Schmutz, Esq.**  
**Andy V. Wright, Esq.**  
**HILL, JOHNSON & SCHMUTZ**  
Attorney for Appellee/Defendants  
River View Plaza – Suite 300  
4844 North 300 West  
Provo, Utah 84604-5663

[ ☒ ] U.S. Mail  
[ ☐ ] Federal Express  
[ ☐ ] Hand-Delivery  
[ ☐ ] Telefacsimile  
[ ☐ ] Other:

By 

---

**IN THE UTAH SUPREME COURT**

---

**CHAD HUDGENS**, an individual, )

Appellant and Plaintiff, )

vs. )

**PROSPER, INC.**, a Utah corporation )  
and **JOSHUA CHRISTOPHERSON**, )  
an individual, )

Case No. 20090391-SC  
080400249

Appellees and )  
Defendants. )

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**CERTIFICATE OF SERVICE RE: COURTESY BRIEF ON  
CD VERSION OF APPELLANT'S BRIEF**

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**Appeal From The Judgment of The Fourth Judicial District Court  
of Utah County, Honorable Gary D. Stott**

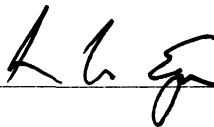
**Evan A. Schmutz (# 3860)**  
**Andy V. Wright (# 11071)**  
**HILL, JOHNSON & SCHMUTZ**  
River View Plaza – Suite 300  
4844 North 300 West  
Provo, Utah 84604-5663  
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Attorney for Defendants-Appellees

**Sean N. Egan (# 7191)**  
Parkside Tower – Suite 950  
215 South State Street  
Salt Lake City, Utah 84111  
Telephone: (801) 363-5181  
Facsimile: (801) 363-5184  
Attorney for Plaintiff-Appellant

I HEREBY CERTIFY that on the 2<sup>nd</sup> day of October, 2009, a true and correct copy of the foregoing **CERTIFICATE OF SERVICE RE: COURTESY BRIEF ON CD OF APPELLANT'S BRIEF** was served upon the persons named below, at the address set out below their name, either by mailing postage prepaid, hand-delivery, Federal Express, or by telecopying to them, a true and correct copy of said document.

**Evan A. Schmutz, Esq.**  
**Andy V. Wright, Esq.**  
**HILL, JOHNSON & SCHMUTZ**  
Attorney for Appellee/Defendants  
River View Plaza – Suite 300  
4844 North 300 West  
Provo, Utah 84604-5663

☒ U.S. Mail  
☐ Federal Express  
☐ Hand-Delivery  
☐ Telefacsimile  
☐ Other:

By 

Tab A

**Sean N. Egan (#7191)**  
Parkside Tower – Suite 950  
215 South State Street  
Salt Lake City, UT 84111-2319  
Telephone: (801) 363-5181  
Facsimile: (801) 363-5184  
Attorney for Plaintiff

---

**IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR  
UTAH COUNTY, PROVO DEPARTMENT, STATE OF UTAH**

---

CHAD HUDGENS, an individual.	)	
	)	<b>VERIFIED COMPLAINT AND</b>
	)	<b>JURY DEMAND</b>
Plaintiff,	)	
vs.	)	
	)	
PROSPER, INC. a Utah corporation and	)	Civil No. <u>080400249</u>
JOSHUA CHRISTOPHERSON, an	)	
individual,	)	Honorable <u>Scott</u>
	)	
Defendants.	)	<b>(Jury Trial Demanded)</b>
	)	
	)	

---

COMES NOW plaintiff Chad Hudgens (“Hudgens”) and complains and alleges against defendants Prosper, Inc. and Joshua Christopherson (“defendants”) as follows:

**PARTIES**

1. Plaintiff Chad Hudgens is a resident of Utah County, Utah.
2. Defendant Prosper, Inc. is a resident of Utah County, Utah.
3. Defendant Joshua Christopherson is a resident of Utah County, Utah.

### **JURISDICTION AND VENUE**

4. This Court has jurisdiction over this case pursuant to U.C.A. § 78-3-4.
5. Venue is proper in this Court under U.C.A. §§ 78-13-5 and 7.

### **BACKGROUND FACTS**

6. Prosper provides self-help and motivational coaching to individual clients. During all relevant times, Hudgens was an employee of Prosper.

7. Hudgens was 26 years old and had been working at Prosper for 10 months at the time of the episodes alleged herein.

8. During all relevant times Christopherson was an employee of Prosper. Upon information and belief, Christopherson was one of Prosper's top income producers.

9. During all relevant times, Hudgens was a member of Christopherson's team.

10. Prosper and Christopherson intentionally engaged in physically and emotionally abusive and intimidating conduct for the express purpose of increasing the productivity of the team. This intentional conduct included the following:

- a. Christopherson would draw mustaches using permanent marker on employees who did not meet Prosper's performance goals;
- b. Christopherson routinely removed chairs from employees who did not meet Prosper's performance goals; and
- c. Christopherson patrolled the work area utilizing a large wooden paddle which he routinely struck on tables and desktops in close proximity to team members;

11. Prosper management knew of this conduct and encouraged it because it resulted in increased revenues for the company. Prosper's management passed by and through Christopherson's team area and was able to see moustaches on its employees, missing chairs and Christopherson's paddle.

12. On or about May 29, 2007, Christopherson asked for volunteers for a new motivational exercise. In his search for volunteers, Christopherson specifically challenged the loyalty and determination of his team members. Christopherson did not disclose what the exercise was. In an effort to prove his loyalty and determination to Christopherson and Prosper, Hudgens volunteered.

13. Christopherson marched his entire team to the top of a hill outside the office. He ordered Hudgens to lie down with his head facing downhill. He instructed the other team members to hold Hudgens by the arms and legs.

14. Christopherson then slowly poured a gallon jug of water over Hudgens' mouth and nostrils, thereby making it impossible for Hudgens for breath for a sustained period of time.

15. Christopherson's exercise is more commonly known as "water boarding," a controversial coercive interrogation technique which some people and governments consider torture. It is designed to, among other things, create panic and confusion in the subject by creating the impression in the subject that he is drowning.

16. Christopherson directed Hudgens' team members to hold him down even though Hudgens was struggling and resisting and was attempting to escape.

17. At the conclusion of his abusive demonstration, Christopherson told the team that he wanted them to work as hard on making sales as Chad had worked to breathe while he was being waterboarded.

18. Following Christopherson's assault, Hudgens approached someone in Prosper's human resources department and explained what had just happened to him. Despite disclosing this information, Prosper took no action, including action against Christopherson, until after Hudgens left Prosper.

19. Following Christopherson's assault, Hudgens began to experience symptoms of sleeplessness, anxiety and depression. He began to feel sick to his stomach at work and was no longer able to work at Prosper.

20. Because of the trauma caused by Prosper's sales exercises, Hudgens has required psychological counseling and has suffered physical and emotional harm.

### **COUNT I**

#### **(Assault and Battery)**

21. Hudgens repeats, realleges and incorporates by reference herein the allegations set forth in paragraphs 1 through 20 of his Verified Complaint.

22. Prosper and Christopherson intentionally used force on Hudgens that caused Hudgens to have reasonable apprehension of immediate bodily harm.

23. The intentional forced used by Prosper and Christopherson did cause Hudgens bodily and emotional harm.



24. As a result of the intentional conduct of Prosper and Christopherson, Hudgens has suffered damages in an amount to be proven at trial.

25. The conduct of Prosper and Hudgens was undertaken in bad faith and was in reckless disregard of and wanton indifference towards the rights of Hudgens, thereby entitling him to an award of punitive or exemplary damages.

## **COUNT II**

### **(Intentional Infliction of Emotional Distress)**

26. Hudgens repeats, realleges and incorporates by reference herein the allegations set forth in paragraphs 1 through 25 of his Verified Complaint.

27. Prosper and Christopherson intentionally utilized means of physical and emotional intimidation and cruelty for the express purpose of causing Hudgens and others to generate more revenue for the company.

28. Prosper and Christopherson intentionally inflicted emotional distress on Hudgens in an outrageous attempt to improve his sales performance and therefore the sales performance of Christopherson's team and the revenue of the company.

26. As a result of the conduct of Prosper and Christopherson, Hudgens has been damaged in an amount to be proven at trial.

27. The conduct of Prosper and Hudgens was undertaken in bad faith and was in reckless disregard of and wanton indifference towards the rights of Hudgens, thereby entitling him to an award of punitive or exemplary damages.

### **COUNT III**

#### **(Wrongful Termination)**

28. Hudgens repeats, realleges and incorporates by reference herein the allegations set forth in paragraphs 1 through 27 of his Verified Complaint.

29. Prosper and Christopherson intentionally created a work environment that made it impossible for Hudgens to remain employed there.

30. The physical and emotional harm inflicted upon Hudgens caused him to leave Prosper. As such, the conduct of Prosper and Christopherson constitutes wrongful termination of Hudgens.

31. As a result of the conduct of Prosper and Christopherson, Hudgens has been injured in an amount to be proven at trial.

32. The conduct of Prosper and Hudgens was undertaken in bad faith and was in reckless disregard of and wanton indifference towards the rights of Hudgens, thereby entitling him to an award of punitive or exemplary damages.

### **COUNT IV**

#### **(Intentional Interference With Contractual Relations Against Christopherson)**

33. Hudgens repeats, realleges and incorporates by reference herein the allegations set forth in paragraphs 1 through 32 of his Verified Complaint.

34. To the extent Christopherson was not acting on behalf of Prosper or working within the scope of his authority at Prosper, he was a stranger to the employment relationship between Prosper and Hudgens.

35. Christopherson's physical and emotional abuse of Hudgens caused Hudgens to quit his job at Prosper. As such, Christopherson interfered with Hudgens' employment relationship with Prosper.

36. Christopherson used improper means in interfering with Hudgens' employment relationship with Prosper and Christopherson acted for an improper purpose.

37. As a result of this conduct, Hudgens has been damaged in an amount to be proven at trial.

38. The conduct of Prosper and Hudgens was undertaken in bad faith and was in reckless disregard of and wanton indifference towards the rights of Hudgens, thereby entitling him to an award of punitive or exemplary damages.

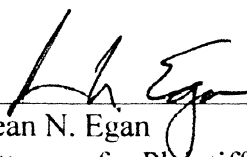
WHEREFORE, Hudgens respectfully prays the following relief:

1. With respect to Count I, damages, including punitive or exemplary damages, in an amount to be proven at trial;
2. With respect to Count II, damages, including punitive or exemplary damages, in an amount to be proven at trial;
3. With respect to Count III, damages, in an amount to be proven at trial;
4. With respect to Count IV, damages, in an amount to be proven at trial;
5. All costs and fees associated with the maintenance of this action; and
6. Any and all other relief this Court may deem just and proper.

**REQUEST FOR JURY**

Pursuant to U. R. Civ. P. 38, Hudgens respectfully requests a jury for all claims in this action so triable.

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of January, 2008.

By \_\_\_\_\_  
Sean N. Egan  
Attorney for Plaintiff

**Plaintiff's Address:**

1166 Canyon Meadows Dr., # 2  
Provo, Utah 84606

**VERIFICATION**

STATE OF UTAH     )  
                              : ss.  
COUNTY OF UTAH )

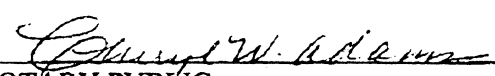
CHAD HUDGENS, being first duly sworn on oath, deposes and states:

I am the plaintiff in the above-captioned matter, and have read the foregoing Verified Complaint. Except where the allegations are based upon information and belief, I have personal knowledge of the facts alleged in the Verified Complaint, and know that the facts alleged are true. Where the allegations are based upon information and belief, I believe the facts are true based upon documents I have reviewed and information provided to me by others.

By   
CHAD HUDGENS

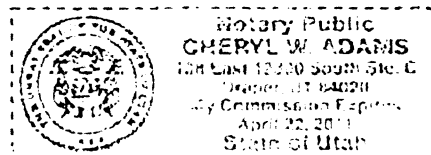
STATE OF UTAH     )  
                              : ss.  
COUNTY OF ~~UTAH~~ ) SALT LAKE  
                              CA

SUBSCRIBED AND SWORN to before me this 15<sup>th</sup> day of January, 2008.

  
NOTARY PUBLIC  
Saratoga Springs, UT 84045  
Residing at: \_\_\_\_\_

My Commission Expires:

04/22/2011



Tab B

FILED

JUL 23 2008

*men*  
4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

IN THE FOURTH JUDICIAL DISTRICT COURT,  
UTAH COUNTY, STATE OF UTAH

CHAD HUDGENS,

Plaintiff,

vs.

PROSPER, INC., and JOSHUA  
CHRISTOPHERSON,

Defendants.

RULING

Date: July 23, 2008

Case No.: 080400249

Judge: Gary D. Stott

On March 11, 2008, Defendants filed a Motion to Dismiss under Rule 12(b)(6) of the Utah Rules of Civil Procedure in response to Plaintiff's Complaint. Plaintiff filed an Opposition on April 9, 2008, and Defendants filed a Reply Memorandum on April 21, 2008. The court heard oral arguments on July 14, 2008, and now issues this ruling.

**BACKGROUND**

On a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6), the court "must construe the complaint in the light most favorable to the plaintiff and indulge all reasonable inferences in his favor." *Mounteer v. Utah Power & Light Co.*, 823 P.2d 1055, 1058 (Utah 1991). In that light, the court sets forth the facts of the case.

Plaintiff Chad Hudgens ("Plaintiff") worked for defendant Prosper, Inc. ("Prosper"), as a member of the team supervised by defendant Joshua Christopherson ("Christopherson").

Prosper provides self-help and motivational coaching to individual clients and Christopherson was one of Prosper's top income producers. Prosper and Christopherson engaged in physically and emotionally abusive and intimidating conduct for the express purpose of increasing the productivity of the team. This conduct included Christopherson patrolling the area with a large wooden paddle which he hit on tables and desks close to team members and removing chairs and drawing mustaches on team members that did not meet sales goals.

In May of 2007, Christopherson asked for volunteers for a new motivational exercise without revealing the nature of the exercise. Plaintiff volunteered as a result of Christopherson's appeal to the loyalty and determination of his team members. Christopherson took the team outside to the top of a nearby hill, where he ordered Plaintiff to lie down with his head facing downhill. Christopherson instructed other team members to hold Plaintiff by the arms and legs while Christopherson slowly poured a gallon jug of water over Plaintiff's mouth and nose, making it impossible for Plaintiff to breathe for a period of time. As Plaintiff was struggling, resisting and attempting to escape, Christopherson directed other team members to hold Plaintiff down. After this demonstration, Christopherson told the team that he wanted them to work as hard on making sales as Plaintiff had worked to breathe during the exercise.

Shortly thereafter, Plaintiff reported the incident to an employee in Prosper's human resources department. Prosper took no action, including action against Christopherson, until after Plaintiff left Prosper. After this incident, Plaintiff began to experience symptoms of sleeplessness, anxiety and depression. He began to feel sick to his stomach at work and was no



longer able to work at Prosper. As a result of the incident, Plaintiff has required psychological counseling and has suffered physical and emotional harm.

## **DISCUSSION**

### *I. Intentional Interference with Contractual Relations*

Based upon the stipulation of the parties on the record, the court grants the Motion to Dismiss with respect to the claim for intentional interference with contractual relations. Counsel for Plaintiff did not object to the dismissal of this claim. According to Utah case law, the defendant in a case for intentional interference with contractual relations must be a third party to the contract. The court concludes, and the parties agree, that Christopherson was not a third party to the contract between Plaintiff and Prosper. Therefore, the claim for intentional interference with contractual relations is dismissed with prejudice.

### *II. Assault and Battery and Intentional Infliction of Emotional Distress*

The court grants the Motion to Dismiss with respect to the causes of action for assault and battery and intentional infliction of emotional distress. Section 34A-2-105(1) of the Utah Code states that the remedy provided in the Workers' Compensation Act is the exclusive remedy of an employee who is injured or killed in the course of his employment. Utah Code Ann. § 34A-2-105(1) (2008). As acknowledged by both parties, the Utah Supreme Court has created a narrow exception to the exclusiveness of the Workers' Compensation Act for those injuries that occur as a result of a conscious and deliberate intent on the part of the employer or its agent to inflict an injury upon the employee. *Bryan v. Utah Int'l*, 533 P.2d 892 (1975); *see also Lantz v.*

*Nat'l Semiconductor Corp.*, 775 P.2d 937 (Utah App. 1989). In *Lantz*, the Utah Court of Appeals explained that in order for a complaint to survive a motion to dismiss, it “must allege *facts* that add up to a deliberate intent to bring about injury.” *Id.* at 940 fn. 5 (quoting 2A A. Larson, *The Law of Workmen's Compensation* § 68.14 at 13-46 (1988) (emphasis in original)).

The allegations contained in the complaint are not sufficient to support a claim that the defendant had a conscious and deliberate intent to injure plaintiff. From the court's perspective, Christopherson undoubtedly exhibited poor judgment to take the actions that led to this case. However, the purpose of those actions was to use plaintiff as an example of maximum effort for the rest of the employees to emulate as they did work for the company. The complaint contains no facts showing that Christopherson took his actions based on a conscious and deliberate intent to injure plaintiff. Indeed, plaintiff asserts that the express purpose of Christopherson's abusive and intimidating conduct was to motivate team members, not to injure plaintiff. Therefore, the claims for assault, battery and intentional infliction of emotional distress are governed exclusively by the Workers' Compensation Act and section 34A-2-105(1), and the Motion to Dismiss is granted with respect to the claims for assault and battery and intentional infliction of emotional distress.

### *III. Wrongful Termination*

The court grants the Motion to Dismiss the claim for wrongful termination. In Utah, the employer-employee relationship is presumed to be at-will, and a plaintiff must show that his case falls within one of three categories to overcome this presumption: “(1) there is an implied or

express agreement that the employment may be terminated only for cause or upon satisfaction of some agreed-upon condition; (2) a statute or regulation restricts the right of an employer to terminate an employee under certain conditions; or (3) the termination of employment constitutes a violation of a clear and substantial public policy.” *Touchard v. La-Z-Boy, Inc.*, 2006 UT 71, P3 (citations omitted). Defendants argued, and Plaintiff conceded, that the first two categories are clearly not applicable. Therefore, the only category that is potentially applicable is termination in violation of public policy.

In *Ryan v. Dan’s Food Stores, Inc.*, 972 P.2d 395 (Utah 1998), the Utah Supreme Court set forth the following elements to make out a prima facie case for wrongful termination in violation of public policy: “an employee must show (i) that his employer terminated him; (ii) that a clear and substantial public policy existed; (iii) that the employee’s conduct brought the policy into play; and (iv) that the discharge and the conduct bringing the policy into play are causally connected.” *Id.* at 404 (citations omitted). The court further emphasized the narrowness of the public policy exception and explained that the public policy at issue is clear and substantial “only if plainly defined by legislative enactments, constitutional standards, or judicial decisions.” *Id.* at 405.

As Defendants have argued, Plaintiff’s complaint does not even address elements (ii) through (iv) of the prima facie case for wrongful termination set forth in *Ryan*. However, in his Opposition and at the oral arguments, counsel for Plaintiff argued that there is public policy against this type of conduct which is made clear and substantial by the enactment of the statute

in the Utah Criminal Code prohibiting hazing. Utah Code Ann. § 76-5-107.5 (2008). While Plaintiff's reliance on the hazing statute is interesting, it fails to show how Plaintiff's conduct brought the policy of the hazing statute into play, especially since the conduct is only considered hazing if the victim is a member or potential member of a school team or the conduct was "for the purpose of initiation, admission into, affiliation with, holding office in, or as a condition of continued membership in any organization...." *Id.* at (1)(b)(i). In addition, the connection between the policy embodied in the hazing statute and the other statutes cited by Plaintiff and the conduct in question here is far too tenuous to comport with the repeated statements of the Utah Supreme Court emphasizing the narrowness of the public policy exception. *See Hansen v. Am. Online, Inc.*, 2004 UT 62, P9; *Ryan*, 972 P.2d at 405. The court concludes that Plaintiff has failed to make out a prima facie case for wrongful termination in violation of public policy. Therefore, Defendants' Motion to Dismiss is granted with respect to the claim for wrongful termination.

#### *IV. Amending the Complaint*

The court denies Plaintiff's request to amend his complaint because the request fails to comply with Utah's formal motion practice rules. Although Plaintiff notes that leave to amend should be freely given where justice so requires, the Utah Supreme Court and Court of Appeals have explained that denying a request to amend a complaint based on a failure to comply with the Utah Rules of Civil Procedure is well within the discretion of the trial court. *Holmes Development, LLC v. Cook*, 2002 UT 38; *Coroles v. Sabey*, 2003 UT App 339, P42. Indeed,

Plaintiff's request is nearly identical to the requests made in both *Holmes* and *Coroles*, the denials of which were upheld by the Utah Supreme Court and the Court of Appeals, respectively. Because Plaintiff has failed to comply with the Rules of Civil Procedure, his request to amend the complaint is denied.

### CONCLUSION

Defendants' Motions to Dismiss for failure to state a claim under Rule 12(b)(6) are granted as to all claims. The claims for assault and battery, intentional infliction of emotional distress, and wrongful termination are dismissed without prejudice, and the claim for intentional interference with contractual relations is dismissed with prejudice. Plaintiff's request to amend his complaint is denied. Counsel for Defendants shall prepare an order reflecting this ruling and submit it to the court for signature.

Dated this 23 day of July, 2008.

  
Judge Gary D. Stott  
Fourth Judicial District Court



**A certificate of mailing is on the following page.**

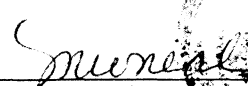
CERTIFICATE OF NOTIFICATION


I certify that a copy of the attached document was sent to the following people for case 080400249 by the method and on the date specified.

METHOD NAME

Mail	SEAN N EGAN Attorney PLA 215 S STATE ST STE 950 SALT LAKE CITY, UT 84111
Mail	EVAN A SCHMUTZ Attorney DEF 4844 N 300 W STE 300 PROVO UT 84604

Dated this 25 day of July, 2008.

  
Deputy Court Clerk



Tab C

**Sean N. Egan (#7191)**  
Parkside Tower – Suite 950  
215 South State Street  
Salt Lake City, UT 84111-2319  
Telephone: (801) 363-5181  
Facsimile: (801) 363-5184  
Attorney for Plaintiff

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**IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR  
UTAH COUNTY, PROVO DEPARTMENT, STATE OF UTAH**

---

CHAD HUDGENS, an individual,	)	
	)	
Plaintiff,	)	<b>VERIFIED AMENDED COMPLAINT</b>
	)	<b>AND JURY DEMAND</b>
vs.	)	
	)	
PROSPER, INC. a Utah corporation and	)	Civil No. 08-0400249
JOSHUA CHRISTOPHERSON, an	)	
individual,	)	Honorable Gary D. Stott
	)	
Defendants.	)	<b>(Jury Trial Demanded)</b>
	)	
<hr style="width: 30%; margin-left: 0;"/>	)	

COMES NOW plaintiff Chad Hudgens (“Hudgens”) and complains and alleges against defendants Prosper, Inc. and Joshua Christopherson (“defendants”) as follows:

**PARTIES**

1. Plaintiff Chad Hudgens is a resident of Utah County, Utah.
2. Defendant Prosper, Inc. is a resident of Utah County, Utah.
3. Defendant Joshua Christopherson is a resident of Utah County, Utah.



### **JURISDICTION AND VENUE**

4. This Court has jurisdiction over this case pursuant to U.C.A. § 78-3-4.
5. Venue is proper in this Court under U.C.A. §§ 78-13-5 and 7.

### **BACKGROUND FACTS**

6. Prosper provides self-help and motivational coaching to individual clients. During all relevant times, Hudgens was an employee of Prosper.

7. Hudgens was 26 years old and had been working at Prosper for 10 months at the time of the episodes alleged herein.

8. During all relevant times Christopherson was an employee of Prosper. Upon information and belief, Christopherson was one of Prosper's top income producers.

9. During all relevant times, Hudgens was a member of Christopherson's team.

10. Prosper and Christopherson intentionally engaged in physically and emotionally abusive and intimidating conduct for the express purpose of increasing the productivity of the team. This intentional conduct included the following:

- a. Christopherson would draw mustaches using permanent marker on employees who did not meet Prosper's performance goals;
- b. Christopherson routinely removed chairs from employees who did not meet Prosper's performance goals; and
- c. Christopherson patrolled the work area utilizing a large wooden paddle which he routinely struck on tables and desktops in close proximity to team members;

11. Prosper management knew of this conduct and encouraged it because it resulted in increased revenues for the company. Prosper's management passed by and through Christopherson's team area and was able to see moustaches on its employees, missing chairs and Christopherson's paddle.

12. On or about May 29, 2007, Christopherson asked for volunteers for a new motivational exercise. In his search for volunteers, Christopherson specifically challenged the loyalty and determination of his team members. Christopherson did not disclose what the exercise was. In an effort to prove his loyalty and determination to Christopherson and Prosper, and thereby be considered a favored member of the team, Hudgens volunteered.

13. Christopherson marched his entire team to the top of a hill outside the office. He ordered Hudgens to lie down with his head facing downhill. He instructed the other team members to hold Hudgens by the arms and legs.

14. Christopherson then slowly poured a gallon jug of water over Hudgens' mouth and nostrils, thereby making it impossible for Hudgens to breathe for a sustained period of time.

15. Christopherson's exercise is more commonly known as "waterboarding," a controversial coercive interrogation technique which some people and governments consider torture. It is designed to, among other things, cause injury by creating panic and confusion in the subject by creating the impression in the subject that he is drowning.

16. Christopherson directed Hudgens' team members to hold him down even though Hudgens was struggling and resisting and was attempting to escape. Christopherson did not stop

pouring water into Hudgens' mouth and nostrils even though he saw that Hudgens was struggling to breathe.

17. Christopherson had a conscious and deliberate intent to injure Hudgens by use of waterboarding. This is so because Christopherson believed that the only way in which the motivational exercise could succeed was to cause Hudgens to experience the panic and suffocation integral to the purpose and functioning of waterboarding. This is why Christopherson directed a team member to hold Hudgens' head in place so that it would not move as he poured water in Hudgens' nose and mouth. This is why Christopherson did not stop pouring water into Hudgens' nose and mouth until the jug was empty even though he saw Hudgens struggling to breathe. In other words, by consciously and deliberately waterboarding Hudgens, Christopherson exhibited a conscious and deliberate intent to cause an injury to Hudgens.

18. Following Christopherson's intentional assault, Hudgens approached someone in Prosper's human resources department and explained what had just happened to him. Despite disclosing this information, Prosper took no action, including action against Christopherson, until after Hudgens left Prosper.

19. Following Christopherson's assault, Hudgens began to experience symptoms of sleeplessness, anxiety and depression. He began to feel sick to his stomach at work and was no longer able to work at Prosper.

20. Because of the trauma caused by Prosper's sales exercises, Hudgens has required psychological counseling and has suffered physical and emotional harm.

## **COUNT I**

### **(Assault and Battery)**

21. Hudgens repeats, realleges and incorporates by reference herein the allegations set forth in paragraphs 1 through 20 of his Verified Complaint.

22. Prosper and Christopherson intentionally used force on Hudgens that caused Hudgens to have reasonable apprehension of immediate bodily harm.

23. The intentional forced used by Prosper and Christopherson did cause Hudgens bodily and emotional harm.

24. As a result of the intentional conduct of Prosper and Christopherson, Hudgens has suffered damages in an amount to be proven at trial.

25. The conduct of Prosper and Hudgens was undertaken in bad faith and was in reckless disregard of and wanton indifference towards the rights of Hudgens, thereby entitling him to an award of punitive or exemplary damages.

## **COUNT II**

### **(Intentional Infliction of Emotional Distress)**

26. Hudgens repeats, realleges and incorporates by reference herein the allegations set forth in paragraphs 1 through 25 of his Verified Complaint.

27. Prosper and Christopherson intentionally utilized means of physical and emotional intimidation and cruelty for the express purpose of causing Hudgens and others to generate more revenue for the company.

28. Prosper and Christopherson intentionally inflicted emotional distress on Hudgens in the erroneous belief that the emotional distress they intended Hudgens to experience would improve his sales performance and therefore the sales performance of Christopherson's team and the revenue of the company.

26. As a result of the intentional conduct of Prosper and Christopherson, Hudgens has been damaged in an amount to be proven at trial.

27. The conduct of Prosper and Hudgens was undertaken in bad faith and was in reckless disregard of and wanton indifference towards the rights of Hudgens, thereby entitling him to an award of punitive or exemplary damages.

### **COUNT III**

#### **(Wrongful Termination)**

28. Hudgens repeats, realleges and incorporates by reference herein the allegations set forth in paragraphs 1 through 27 of his Verified Complaint.

29. Prosper and Christopherson intentionally created a work environment that made it impossible for Hudgens to remain employed there. As such, Hudgens was constructively terminated by Prosper.

30. The constructive termination of Hudgens violated a public policy in Utah regarding the physical and emotional integrity of Utah citizens, particularly in the workplace. This policy is found directly in numerous Utah case authorities, statutes and governmental pronouncements.

31. Allowing Prosper and Christopherson to avoid any consequences of their assault on the physical and emotional integrity of Hudgens jeopardizes the public policy articulated above. In fact, it would sanction an egregious violation of that policy.

32. The public policy of protecting Utah citizens from emotional and physical assault in the workplace is directly connected to Hudgens' termination. This is so because the waterboarding episode, which was a direct violation of the public policy in that it violated the physical and emotional integrity of Hudgens, caused Hudgens to leave Prosper.

33. As a result of the wrongful constructive termination of Hudgens by Prosper and Christopherson, Hudgens has been injured in an amount to be proven at trial.

34. The conduct of Prosper and Hudgens was undertaken in bad faith and was in reckless disregard of and wanton indifference towards the rights of Hudgens, thereby entitling him to an award of punitive or exemplary damages.

WHEREFORE, Hudgens respectfully prays the following relief:

1. With respect to Count I, damages, including punitive or exemplary damages, in an amount to be proven at trial;
2. With respect to Count II, damages, including punitive or exemplary damages, in an amount to be proven at trial,
3. With respect to Count III, damages, in an amount to be proven at trial,
4. All costs and fees associated with the maintenance of this action; and
5. Any and all other relief this Court may deem just and proper.

**REQUEST FOR JURY**

Pursuant to U. R. Civ. P. 38, Hudgens respectfully requests a jury for all claims in this action so triable.

RESPECTFULLY SUBMITTED this \_\_\_\_ day of October, 2008.

By \_\_\_\_\_  
Sean N. Egan  
Attorney for Plaintiff

**VERIFICATION**

STATE OF UTAH     )  
                                      : ss.  
COUNTY OF UTAH )

CHAD HUDGENS, being first duly sworn on oath, deposes and states:

I am the plaintiff in the above-captioned matter, and have read the foregoing Verified Amended Complaint. Except where the allegations are based upon information and belief, I have personal knowledge of the facts alleged in the Verified Amended Complaint, and know that the facts alleged are true. Where the allegations are based upon information and belief, I believe the facts are true based upon documents I have reviewed and information provided to me by others.

By \_\_\_\_\_  
CHAD HUDGENS

STATE OF UTAH     )  
                                      : ss.  
COUNTY OF UTAH )

SUBSCRIBED AND SWORN to before me this \_\_\_\_ day of October, 2008.

My Commission Expires:

\_\_\_\_\_

\_\_\_\_\_  
NOTARY PUBLIC

Residing at:

\_\_\_\_\_



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the \_\_\_\_\_ day of October, 2008, a true and correct copy of the foregoing **VERIFIED AMENDED COMPLAINT AND JURY DEMAND** was served upon the person named below, at the address set out below their name, either by mailing postage prepaid, hand-delivery, Federal Express, or by telecopying to them, a true and correct copy of said document.

**Evan A. Schmutz, Esq.**

**Andy V. Wright, Esq.**

**HILL, JOHNSON & SCHMUTZ**

River View Plaza – Suite 300

4844 North 300 West

Provo, Utah 84604-5663

☐ U.S. Mail

☐ Federal Express

☐ Hand-Delivery

☐ Telefacsimile

☐ Other:

By \_\_\_\_\_

Tab D

Jon M. Huntsman, Jr.  
Governor

Declaration

Whereas, residents of the State of Utah deserve to live in communities that support safe and healthy living; and

Whereas, community and workplace safety should be a major concern for all Utah citizens, employers, employees and their families; and

Whereas, safe communities require the cooperation of all levels of government, business and industry, as well as the general public; and

Whereas, workplace and other accidents, illnesses, and deaths continue to cause untold human pain and suffering to injured Utah workers and their families; and

WHEREAS, citizens deserve a solution to statewide community safety, workplace safety and health threats; and

Whereas, the summer season, traditionally a time of increased accidental injuries and fatalities, is an appropriate time to focus attention on injury risks and prevention; and

Whereas, successful workplace safety programs are providing that solution by reducing accidents, illnesses, and deaths; and by increasing productivity, improving morale, lowering workers' compensation premiums, and resulting in improved working environments; and

Whereas, The Utah Labor Commission and the Utah Department of Public Safety continue to initiate safety efforts, assure occupational safety and health and provide information and services for Utah employers, employees, and all citizens of Utah;

Now, Therefore, I, Jon M. Huntsman, Jr., Governor of the State of Utah, do join with the nation in "Celebrating Safe Communities", the theme for 2007 National Safety Month, and do hereby declare the month of June 2007 as

Community and Workplace Safety Month

in Utah, and call upon all Utah employers, employees, and citizens to make safety and the reduction of accidents, illnesses, and deaths the primary objective to improve the quality of life for all Utah residents.

(Signature)